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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-413

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

NICHOLAS J. LARIONOFF, JR., *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether there are special and important reasons for this Court in its sound judicial discretion under Rule 19, Supreme Court Rules, to review on writ of certiorari the decision of the United States Court of Appeals for the District of Columbia Circuit in *Larionoff, et al. v. United States, et al.*, 533 F.2d 1167 (D.C. Cir. 1976), pet. for rehearing denied, 533 F.2d 1188?

STATEMENT OF FACTS

In 1965 the President of the United States through his Secretary of Defense determined that United States military personnel could be induced to extend their enlistments for the first time if the Secretary was authorized by Congress to place special bonuses at this career decision point. The Congress of the United States agreed and a Variable Reenlistment Bonus (VRB) program was initiated. Respondents and members of their class were induced to extend their enlistments for two or more years in consideration of these bonuses. After completing advanced training and entering into their particular skill, respondents were denied their promised bonuses. Of the seven named representative respondents, six were denied their bonuses by administrative regulation of the United States Navy and the seventh, it is additionally alleged, by act of Congress.

STATEMENT OF REASONS FOR DENYING REVIEW

1. Six of seven representative respondents (hereinafter referred to as the "Larionoff Class") were denied their VRBs by administrative regulation of the United States Navy. The Government's petitions on this point have attempted to create a conflict among the Circuits for the Larionoff Class where no conflict exists.[1] Neither *Carini v. United States*, 528 F.2d 738 (1975) in the Fourth Circuit nor *Collins v. Rumsfeld*, C.A. 9. Nos. 75-2935, 75-2967, 75-3238, and 75-3559 (decided Sept. 27, 1976) in the Ninth Circuit addresses this point. Indeed, the Fourth Circuit stated at footnote seven of its opinion that it did not address itself to a Larionoff

[1] We note that the question presented in the *Larionoff* petition is identical to the question presented in the Memorandum for Respondents in *Carini v. United States*, No. 75-1695.

Class point and stated that ". . . a court might reasonably hold the Navy bound by its representations, . . .". The opinions of the District Court and the Court of Appeals for the District of Columbia, uncontradicted by the Government's petition on this point except in the interest of a consistent result among all respondents, should be affirmed. (Pet. App. 55a).[2]

2. Respondent representative class member Johnson (hereinafter referred to as the "Johnson Class") has become the real focus of the Government's petition. The Johnson Class members are alleged to be barred from their VRBs because of the repeal of the authorizing statute. The District of Columbia Circuit held that not withstanding this repeal there was no legal justification to apply this repeal retroactively to the Johnson Class. (Pet. App. at 63a, note 8). In doing so the District of Columbia Circuit rejected a parade of horribles contrived by the Government on appeal and then forged anew in a Petition for Rehearing. At the core of these exhaustive opinions lies a recognition of the fact that the Government has the power to promise a specific sum of money in return for services to be performed by United States military personnel. (Pet. App. 61a). In addition thereto, the Government having made this promise could not subsequently refuse to honor its promise and yet demand these class members serve two or more years of their extended enlistments. Nor could the Government label its promise a gratuity, as opposed to a contract right, or the repeal of VRBs as the exercise by Congress of a paramount power. This Court should affirm the findings of the panel in the District of Columbia Circuit based upon the record as a whole together with the exhaustive opinions in the Circuit. There is

[2] Appendix A to the Government's Petition for Writ of Certiorari is in error at page 23(a) at line 7 and should read ". . . when the VRB award level was at a *multiple of two but entered into extended service when the* multiple was set at four would receive the higher award level." (Italics indicates error.)

no need to hear this case for the Johnson Class must succeed or fail based upon the panel's opinions. To the extent that the *Carini* and *Collins* opinions are inconsistent they should be reversed.

3. The practical considerations which the Government cites in favor of review are more persuasive of summary affirmance of all parts of the opinion below. It is the Government, not the representative respondents, that chose to sow the seeds of conflict throughout the federal judiciary. Having chosen to argue inconsistent rights in over 40 law suits, is it no wonder errors have been made? Also of paramount importance to the Government must be the concern of an all volunteer military service and each prospective and present members reliance upon his or her contract. Lastly there are rights of the approximately 36,000 enlisted personnel which have been too long denied and should be swiftly affirmed by order of this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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